

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DANTE CYRONE FULTON,

Defendant and Appellant.

E035063

(Super.Ct.No. RIF97420)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Paul E. Zellerbach,
Judge. Affirmed

Greg M. Kane, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, Karl T. Terp, and Marvin
E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Dante Fulton asks us to reverse his conviction for first degree murder,
contending that the trial court erred prejudicially by permitting the prosecution to adduce

evidence of defendant's character for violence, pursuant to Evidence Code section 1103,¹ and that the prosecutor committed prejudicial misconduct by questioning defendant about his alleged membership in a gang. We find no error, and we therefore affirm the conviction.

PROCEDURAL HISTORY

Defendant was charged with one count of murder, in violation of Penal Code section 187, subdivision (a). The alleged victim was Yvette Sanders. The information also alleged that defendant personally and intentionally discharged a firearm and proximately caused great bodily injury or death in connection with the substantive offense, pursuant to Penal Code section 12022.53, subdivision (d).

A jury convicted defendant of first degree murder and found the firearm allegation true. The court sentenced defendant to 25 years to life for first degree murder and imposed a consecutive term of 25 years to life for the firearm enhancement.

Defendant filed a timely notice of appeal.

FACTS

Two or three days before the homicide, which occurred on May 29, 2001, defendant's girlfriend, Vondila Bellamy, moved out of the apartment they had shared. After she moved out, Bellamy telephoned defendant to make arrangements to meet him at the apartment to pick up some of her belongings. Defendant went to the apartment and waited for a while, but Bellamy did not show up. Defendant placed her belongings on a

¹ All statutory citations are to the Evidence Code, unless another code is specified.

porch behind the apartment, apparently out of view of passersby. A day or two later, she called again about her belongings and became angry when he told her where they were. According to defendant, Bellamy was so enraged that she threatened to kill him and repeatedly paged him with the message “187,” the Penal Code section which defines murder.²

On the evening of May 29, 2001, Bellamy went to the home of Yvette Sanders. Sanders’s son, Damar, was the father of one of Bellamy’s children. Sanders apparently agreed to take Bellamy to pick up her possessions. Sanders called a neighbor, Kristshanda Wilborn, and asked if she wanted to go somewhere with her. Wilborn agreed, and went to Sanders’s house. Sanders told her they were going to collect Bellamy’s belongings.

Sanders, Bellamy, Wilborn and Sanders’s foster daughters Rosemary Medrano and Kanisha Hill all got into Sanders’s Suburban and drove to the home of Jerome Silas, a friend of defendant’s whom defendant was visiting that evening, along with his friend Al Guidry. All of the women in the Suburban were angry as they drove to find defendant, because of “things that were said” before they left Sanders’s house.

Wilborn had collected two pool cues and two pool balls from her home and took them along. The pool balls were placed into socks, apparently to be used as saps.

Wilborn explained that she brought the items as defensive weapons “just in case” there

² The preceding facts are derived from defendant’s testimony. The prosecution did not dispute the events he described. Bellamy could not be located for the trial, and so did not testify.

was violence. She did not explain why she anticipated violence, but insisted that no one told her to bring weapons and that there was no plan to attack defendant. Medrano echoed Wilborn's testimony that she brought weapons for protection, but that no one told her to do so.

As soon as Sanders pulled up and parked across the street from Silas's house, Silas, Guidry and defendant walked over. Almost immediately, defendant and Sanders began yelling at each other. Defendant reached through the open driver's window and punched Sanders once on the face or on the side of her head. Sanders, Bellamy, Wilborn and Medrano got out of the Suburban. They were all very upset, and the argument escalated. However, no one was hitting anyone; the confrontation was purely verbal. Wilborn had a pool cue in her hand and Medrano had a pool-ball sap. Neither Wilborn nor Medrano saw any of the women with any other type of weapon at any time during the incident. Wilborn was not aware that anyone had a knife or dog repellent, although a steak knife and a can of dog repellent were found in the street near where Sanders fell.

Regina Jones, Silas's wife, had come out and was trying to calm things down. She testified that she spoke to Sanders, who did calm down, apologized for the commotion and agreed to leave. However, Wilborn and Medrano testified that although Jones was trying to make peace, the argument continued nevertheless. They were not aware of Sanders agreeing to leave. A neighbor, Jose Orozco, told police that Jones tried to separate the "girls" from defendant but that the "girls" kept going back and resuming the confrontation.

Sanders told Hill to take the Suburban and go get her son, Damar. Hill and Medrano got into the Suburban and left. They were unable to locate Damar and did not return with him.

After the Suburban left, the arguing continued. Defendant got into his car and began to drive away. He drove only a short distance, then made a U-turn, drove past the group of women and parked. He got out of the car and said “I’m going to show you bitches what type of nigger I am.” He walked up to Sanders and struck her on the head three or four times. Sanders attempted to deflect the blows but did not hit defendant. Defendant had retrieved a revolver from his car and was using it to hit Sanders. While he was hitting her, the gun discharged. Sanders began to walk away from defendant, moving into the street. Defendant fired two shots in her direction. Sanders fell in the street and did not get up. Defendant fired two more shots toward Bellamy. He then returned to his car and drove off.

Sanders suffered a single fatal gunshot wound.

The Defense Case

One of the defense theories of the case was that defendant acted in self-defense or in the honest but unreasonable belief that he needed to defend himself. Defendant’s testimony was thus directed toward establishing the basis for his belief.

Defendant testified that on the day Bellamy moved out of their apartment, Sanders came to pick her up. He had words with Sanders, and she struck him on the face. While they were arguing on the street, a car containing Sander’s son Damar and another man

pulled up behind defendant's car. That incident occurred two or three days before the homicide.

The following day, he learned that someone had shot at his brother Christopher's house. He saw the bullet holes in the house the day after that. He became concerned that someone was looking for him, although he did not live with his brother. He knew that there was "word out" that someone was looking for him. The day the shots were fired at Christopher's residence, defendant obtained the gun he later used to shoot Sanders. He explained that he had been shot by a girlfriend, Vykki Jones, in 1997, and was afraid of being shot again. He explained that having been shot once before, he was afraid of threatening situations. He was also afraid of something happening because Bellamy was so enraged about his handling of her possessions. She had "cursed [him] out" on the phone. She threatened to kill him. She then paged him with "187" several times.

On the evening of the shooting, defendant drank several large cans of beer and smoked some marijuana. When he saw the Suburban pull up in front of Silas's house, he recognized it and thought there might be a confrontation. Bellamy knew her clothes were at the apartment and she had no reason to come to his friend's house. As soon as the Suburban stopped, the women began yelling and screaming. He, Silas and Guidry walked across the street. He walked up to the driver's side of the vehicle and began arguing with Sanders. He denied hitting her.

The women all got out of the Suburban, and defendant argued with Sanders and Bellamy, both of whom had sticks in their hands. He could see that some of the others had weapons in their hands but could not see what they were. Bellamy swung her stick

and hit him on the shoulder, and he believed Sanders was coming at him with a stick as well. Defendant got into his car with Guidry and drove to the corner, then made a U-turn. That was the way he always left from Silas's house, and he did not know any other way out of the area. He had heard Sanders tell someone to go get Damar. Damar had a "bad rep" and had been in prison. When he saw the Suburban leave, he thought that more people would be on their way, and he wanted to get out of there. However, after he made the U-turn, he heard something hit his car. He decided to stop to inspect the car for damage. He had not seen anyone running after his car, but a neighbor, Elida Orozco, told police that she saw Sanders running after defendant's car before he made the U-turn.

When defendant got out of the car to examine the damage, Sanders came up to him and hit him with a stick. He fell and yelled to Guidry to get him the gun. He hit Sanders with the gun to make her back off. The gun went off accidentally. He was frightened and angry, and was just trying to get her off him.

Sanders began to run away from him. He fired two shots into the air in her direction. He wasn't aiming at her and did not intend to hit her. He also fired two shots into the air in Bellamy's direction. He wasn't sure why he fired, except that he was afraid. He did not see any knives or guns, but he felt he was defending himself.

On direct examination, defendant testified that Vykki Jones shot him because he was leaving her. She had told him that she would kill him if he ever left her, that if she couldn't have him, no one could. He also testified that his lifestyle did not involve harming anyone. On cross-examination, he denied several incidents in which he allegedly beat Jones or threatened her with a gun. He denied having put a gun to her

head and threatening to kill her if she left him. He denied having kept her captive in her house, beating her and threatening to kill her.

On rebuttal, Jones testified to several incidents in which defendant beat her and threatened to kill himself or to kill her. In several of them, he was armed with a gun. The final incident ended when she shot defendant. Defendant held her captive inside the apartment overnight and repeatedly threatened to kill her. In the morning, after they had both slept, she asked if he was serious about killing her. He said he was. He then began threatening to kill everyone in the house, which included Jones, her roommate, and the roommate's three friends. She got her roommate's gun, then shot defendant in the abdomen and in the mouth. She then took him to the hospital and turned herself in. She was not prosecuted. Jones admitted that defendant did not have a weapon during that incident, and that he actually threatened to go get a gun and return to kill them all.

DISCUSSION

Use of Prior Acts of Misconduct

Defendant contends on various grounds that the trial court abused its discretion and violated his constitutional right to due process by permitting the use of the evidence, described above, of defendant's prior acts of violence against Vykki Jones.

The trial court admitted the evidence for two distinct purposes: for impeachment of defendant's veracity if he testified, pursuant to *People v. Wheeler* (1992) 4 Cal.4th 284 (*Wheeler*), and for proof that defendant had a character trait for violence and that he acted in conformity with that trait when he shot Yvette Sanders, pursuant to section 1103, subdivision (b). Although defendant includes the use of the evidence for impeachment

purposes in his arguments concerning the use of specific instances of conduct to prove character, the two issues are related only in the sense that they involve the same evidence. Thus, we will address them separately.

Impeachment Under *People v. Wheeler*

In *Wheeler, supra*, 4 Cal.4th 284, the California Supreme Court held that specific instances of conduct which involve moral turpitude but which do not result in felony convictions are relevant to impeach a witness's veracity because such conduct "may suggest a willingness to lie." (*Id.* at p. 295.) Thus, such evidence is presumptively admissible pursuant to the "Truth-in-Evidence" amendment to the state constitution, which provides that all relevant evidence must be admitted in criminal trials, subject to specified exceptions. (*Id.* at pp. 287-288, 295; Cal. Const., art. I, § 28, subd. (d).) The court may exercise its discretion under section 352 to exclude such evidence if it finds that the probative value of the evidence is outweighed by its prejudicial effect, or for other reasons set forth in section 352. (*Wheeler, supra*, at pp. 291-292, 296.)

In this case, the court found that all of the instances of violence and threats of violence against Jones involved moral turpitude. Defendant did not challenge those findings below, and does not challenge them on appeal. Trial counsel also made no objection that the evidence was more prejudicial than probative and should be excluded pursuant to section 352, and the court made no reference to section 352 or to the factors involved in determining prejudice versus probative value. However, defendant now

contends that section 352 rendered the evidence inadmissible as a matter of law for *Wheeler* purposes.³

As a general rule, the party seeking exclusion of evidence pursuant to section 352 must make an objection on that ground at trial in order to raise the issue on appeal. (*People v. Ochoa* (1998) 19 Cal.4th 353, 453.) Neither *Wheeler* nor any other case we have found has held that the court must consider section 352 factors in the absence of a request from the party seeking exclusion of the evidence, or that the court's failure to do so may be challenged on appeal in the absence of such a request or an objection. Thus, defendant's argument is waived. (*People v. Ochoa, supra*, at p. 453.)

Character Evidence Pursuant to Section 1103

After the conclusion of defendant's case in chief, the prosecutor renewed his earlier request to use the evidence concerning defendant's acts of violence against Jones as character evidence, pursuant to section 1103, subdivision (b).⁴ Section 1103 permits proof of character by means of reputation evidence, opinion evidence or evidence of

³ Defendant also asserts that *Wheeler* permits impeachment only with conduct that "is" a misdemeanor, i.e., conduct which results in a misdemeanor conviction. This is incorrect. *Wheeler* makes it clear that it is conduct and not the fact of a misdemeanor conviction which is admissible for impeachment. (*Wheeler, supra*, 4 Cal.4th at pp. 295-297, 300.)

⁴ Section 1103, subdivision (b) provides that, in a criminal action, "evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character

[footnote continued on next page]

specific instances of conduct. Defendant argues that the use of specific instances of conduct to prove character and thus to prove conduct in conformity with that character violates due process. In the alternative, he argues that section 352 compelled the exclusion of the evidence of his prior conduct for that purpose. However, both arguments fail at the threshold because the record does not unambiguously show that the trial court permitted the prosecution to use specific instances of conduct for purposes of section 1103, subdivision (b), as defendant asserts.

The prosecutor indicated that he intended to ask Jones about defendant's reputation for violence pursuant to section 1103. Defense counsel objected, saying that although he thought Jones could be asked about the specific instances of conduct which were raised during the prosecutor's cross-examination of defendant, there was no basis for allowing her to testify about defendant's reputation for violence, because defendant did not open the door for the use of section 1103 merely by testifying that Yvette Sanders had hit him a few days before the homicide. The court pointed out that according to the prosecutor's offer of proof, Jones would be testifying to specific instances of conduct within her own personal knowledge rather than to her knowledge of defendant's

[footnote continued from previous page]

tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a).”

Paragraph (1) of subdivision (a) provides that evidence of the character or a trait of character of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by section 1101 if the evidence is offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. (§ 1103, subd. (a)(1).)

reputation in the community. At that point, defense counsel objected that specific instances of conduct were more powerful than evidence of reputation, and cited section 352.

The court then made the following ruling:

“Well, I think that in a sense the defense did open the door pursuant to Evidence Code Section 1103(a). And, you know, 1103(b) does allow this type of rebuttal type [*sic*] of evidence or testimony. But I think in weighing and balancing what Ms. Jones is going to testify to with respect to several specific instances of violence concerning [defendant], I think that the probative value is far outweighed by the prejudicial effect. [¶] The jury is going to get a full understanding and flavor of [defendant] and Ms. Jones’ relationship, whether or not she can testify to his – his character or reputation in the community. And, again, I think she’ll be testifying from basically her own personal knowledge. [¶] So, again, under 352 type of analysis [*sic*], I’m not going to allow the People to ask that.”

The prosecutor proceeded to ask Jones about the specific instances, without objection from the defense. She did not testify about defendant’s reputation.

The parties disagree as to the meaning of the court’s ruling. Respondent contends that the court intended to exclude reputation evidence, while appellant contends that it intended to exclude specific instances of conduct. The ruling is ambiguous, and we are unable to determine whether the court intended to exclude reputation evidence or to exclude evidence of specific instances of conduct. The burden is on the appellant to provide a record which affirmatively shows error. If the record is ambiguous, we must

resolve the issue against the appellant. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631-632.)

Moreover, if the court's ruling did exclude evidence of specific instances of conduct, as defendant asserts, then court did not make an erroneous ruling which allowed inadmissible evidence to come in. Rather, under that scenario, the evidence only came in because the prosecutor elicited it in violation of the court's ruling, and the defense did not object. The subject of the objection would not have been the court's ruling but the prosecutor's misconduct in eliciting evidence the court had ruled inadmissible. (*People v. Smithey* (1999) 20 Cal.4th 936, 960.) Claims of prosecutorial misconduct are waived unless the defendant makes a timely objection. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Because the defense did not object, any claim of error pertaining to Jones's actual testimony, as opposed to the court's ruling on the prosecutor's motion and the defense objection, is waived.

Defendant also argues that his testimony that Sanders had hit him a few days before the homicide did not open the door to evidence of his character for violence because his testimony was not intended to assert that Sanders had a character for violence, but was rather directed toward his state of mind at the time of the homicide, i.e., his belief that he was at risk of serious bodily harm and needed to defend himself.

It is questionable whether a single incident of mild violence, such as slapping or punching another person, apparently without causing injury, constitutes evidence of a character trait for violence. "Character" is a person's "moral constitution" (5 Wigmore, Evidence (Chadbourn rev. 1974) § 1608, p. 579) or his "actual moral or psychical

disposition or sum of traits” (1A Wigmore, Evidence (Tiller rev. 1983) § 52, p. 1148), and a single incident is probably insufficient to establish a trait of character. (See *Rea v. Wood* (1894) 105 Cal. 314, 320.) However, even if defendant did not open the door to evidence of his own character for violence by testifying to a single act of mild violence by Sanders, Jones’s testimony was independently admissible for impeachment of defendant’s veracity pursuant to *Wheeler, supra*, 4 Cal.4th 284, as we have previously discussed. It was also admissible to impeach defendant’s testimony concerning how Jones came to shoot him. Defendant said that Jones told him she would kill him if he tried to leave her, that if she couldn’t have him, nobody could. When he nevertheless took his belongings and began to walk out the door, Jones shot him. The prosecution was entitled to challenge this version of events with Jones’s detailed testimony concerning a volatile and abusive relationship which culminated in her shooting defendant after a long night of threats of violence and death. (See *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1176; *People v. Lankford* (1989) 210 Cal.App.3d 227, 240-241.) It was also admissible to impeach defendant’s claim that his “lifestyle” did not include harming people. (*Ibid.*) Thus, even if the court erred in concluding that section 1103 applied, defendant was not prejudiced because the evidence would have come in for the other purposes. Moreover, as defendant points out, the prosecutor did not argue to the jury that it could consider defendant’s violence toward Jones to determine that defendant had a character for violence, and the court gave no instruction permitting the jury to make that

inference.⁵ Thus, there is no basis for concluding that the jury was misled into considering Jones's testimony as evidence of defendant's character.

Prosecutorial Misconduct

Defendant next asserts that the prosecutor committed misconduct by asking defendant if he was "familiar with" a gang called the Lynwood Crips. The court had ruled that the prosecutor could ask defendant if he knew that his brother Christopher was a Lynwood Crip, but that he could not ask defendant about his own status as a member of that gang. Christopher Fulton's gang affiliation was arguably relevant because of defendant's testimony that Christopher's residence had been the target of gunfire a few days before the Sanders homicide. The prosecutor wished to rebut the inference that Sanders or people associated with her had shot at Christopher's house, thus perhaps lending credence to defendant's belief that he needed to defend himself against Sanders.

During cross-examination, the prosecutor asked defendant about his testimony that he was aware that someone had shot at Christopher's house a few days before the homicide. He then asked defendant if he was familiar with the Lynwood Crips. Defense counsel objected, and the court sustained the objection. The prosecutor went on to ask if defendant's brother was a member of the Lynwood Crips. Defendant said "No, he's not."

⁵ There is no indication in the record that either side requested instructions on the purposes for which the jury could use the evidence concerning defendant's past acts of violence, and defendant does not argue that the court was required to give such instructions in the absence of a request.

The prosecutor then asked if drive-by shootings were a common occurrence between rival gang members. Defendant replied that they are.

Asking questions which are designed to elicit inadmissible evidence is misconduct. (*People v. Smithey, supra*, 20 Cal.4th at p. 960.) However, we are not persuaded that the prosecutor committed misconduct by asking if defendant was “familiar with” the Lynwood Crips. The prosecutor’s question about defendant’s familiarity with the gang appears to be merely preliminary to asking about Christopher’s membership in the gang and about any possible relationship between Christopher’s gang membership and the shooting incident at Christopher’s residence. That the court sustained the objection to the question about defendant’s familiarity with the gang, perhaps out of an abundance of caution, does not elevate the act of asking the question to misconduct. Moreover, we presume that the jury obeyed the court’s instruction not to guess at the answer to any question to which an objection was sustained, and not to assume to be true any insinuation suggested by a question. (CALJIC No. 1.02.) We therefore conclude that there is no reasonable likelihood that the jury was misled by the question, even if it was improper. (*People v. Smithey, supra*, 20 Cal.4th at p. 961.)

Furthermore, as a general rule, a defendant may not complain on appeal of prosecutorial misconduct unless, in addition to making a timely objection, he requested that the court admonish the jury to disregard the impropriety. (*People v. Samayoa, supra*, 15 Cal.4th at p. 841.) Here, the defense did not request an admonition, and the claim of error was waived.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

/s/ McKinster
J.

We concur:

/s/ Ramirez
P. J.

/s/ Ward
J.